

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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**IN THE MATTER OF PROVISIONAL
STOCKWATER PERMIT NOS. 41QJ 30006070
AND 41QJ 30006071 ISSUED TO JAMES &
MARJORIE PRIBYL**

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FINAL ORDER

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BACKGROUND

The proposal for decision in this matter was entered on September 23, 2004. The proposal recommended that Permit No. 41QJ 30006070 (Lower Pond) be modified and reissued, subject to certain conditions, and that Permit No. 41QJ 30006071 (Upper Pond) be modified and reissued, subject to certain conditions. (Because the findings of fact and conclusions of law for the Lower Pond and Upper Pond are similar, they are grouped together and the Lower Pond is addressed first in the discussion that follows.)

The permittee and the complainant in this matter each filed timely written exceptions and responses to exceptions. The permittee requested an oral argument hearing.

I have been delegated the authority to make the final decision for the Department of Natural Resources and Conservation (Department) in this matter. An oral argument hearing was held before me on February 11, 2005 in Helena. Holly Franz presented arguments on behalf of the permittee (James and Marjorie Pribyl, hereafter "Permittee"); J. Blaine Anderson presented arguments for the complainant (Gollaher Ranch Company, hereafter referred to as "Complainant" or "Gollaher").

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order:

reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. (Strom v. Logan, 304 Mont. 176, 18 P.3d 1024 (2001))

Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. (ARM 36.12.229(2)) The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, and authorities upon which the party relies. (ARM 36.12.229(1))

I have considered the exceptions and reviewed the record under these standards.

DISCUSSION

Issues

The issue in this contested case is whether rights of other appropriators have been or will be adversely affected, and if so, whether the Department should revoke the permits or require the permittee to modify the impoundments or pits and make the permits subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators. (Mont. Code Ann. § 85-2-306(3); Notice of Hearing in this matter, May 21, 2004.)

The Legislature established a special process for issuance of permits to appropriate water for use by livestock by means of certain impoundments of limited amounts of water from water sources that are not perennial. (Mont. Code Ann. § 85-2-306(3)). The Legislature has also established special processes for other specific types of appropriations. The requirements and the Department's authority are different from the requirements in Mont. Code Ann. § 85-2-311 that apply to water use permits generally. Specifically, the plain meaning of Mont. Code Ann. § 85-2-306(3) requires the Department to *automatically* issue permits subject to this section. The Department may modify or revoke the permit after issuance only as provided by law.

Mont. Code Ann. § 85-2-306(3) provides:

If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit

subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators.

Complainant argues, but does not show, that the Department should revoke the permit based on a determination of issues other than other than adverse effect. Complainant has cited numerous precedents and cases that do not apply here because they apply to permits issued pursuant to Mont. Code Ann. § 85-2-311 or because the cases were decided prior to enactment of Mont. Code Ann. § 85-2-306(3).

Complainant argues that the permits should be revoked because: the Hearing Examiner failed to determine that no water is legally available; the Hearing Examiner failed to determine that the appropriation is a beneficial use; that the ponds are not necessary because stock can water from other water sources; and that the permits should be revoked because the issued permits and the applications are materially incorrect. Complainant further argues that, if the Hearing Examiner cannot order unrestricted access for Complainant to inspect the Permittee's headgates, the only remedy is complete closure of the headgates and ponds.

The Department's decision in this case must be based on a determination of whether or not the rights of other appropriators have been or will be adversely affected. In general, the Department does not have the authority to revoke a permit based on a determination of these other issues identified by the Complainant.

While the Department has the authority to decrease the amount appropriated if the water is not being applied to the beneficial use contemplated in the permit, it may only do so after the Department gives notice to the permittee and requires the permittee to show cause why the permit should not be modified or revoked. (Mont. Code Ann. § 85-2-314) The notice of a hearing for a contested case must include a reference to the particular sections of the statutes involved and a short and plain statement of the matters asserted. (Mont. Code Ann. § 2-4-601) Neither the statute nor any assertion that water was not being put to beneficial use as described in the permit were included in the notice of hearing or any subsequent notice of issues for this case. Therefore, a modification of the permit based on application of water to beneficial use is outside the scope of this contested case. Regardless of the terms of the permit, Permittee is subject to the requirements of Mont. Code Ann. § 85-2-301, which provides that a person may appropriate water only for a beneficial use.

Burden of Proof

Complainant argues that the Hearing Examiner's ruling that the Complainant has the burden of proof and the initial burden of production in this matter is erroneous and contrary to

law. (See Conclusions of Law Nos. 3 and 12) The Hearing Examiner ruled on this matter in the Prehearing Order on Burden of Proof (July 23, 2004).

Briefs on this issue and responses to the briefs were filed by both parties. I have reviewed these briefs and responses, the Complainant's exception, and the relevant case law and I have determined that the Hearing Examiner correctly concluded that Complainant Gollaher has the burden of proof and the initial burden of production.

The plain meaning of the law in this case is clear: The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence. (Mont. Code Ann. § 26-1-401) Except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting. (Mont. Code Ann. § 26-1-402)

Complainant admits that the law governing this contested case proceeding does not specify which party has the burden of proof. Therefore, the law does not provide otherwise and the provisions of Mont. Code Ann. §§ 26-1-401 and 26-1-402 apply to this contested case.

Complainant Gollaher's claim would be defeated if no evidence were given on either side. A determination that other appropriators have been or will be adversely affected is essential to the claim that Complainant is asserting.

Complainant argues that the entire statutory scheme of the water rights statutes puts the burden of proof on the applicant for a new water right and cites Royston (Matter of Application for Change of Appropriation of Water Rights for Royston), 249 Mont. 425, 816 P.2d 1054 (1991)). In Royston, the Montana Supreme Court affirmed the determination of the District Court that the applicant for a change of appropriative water rights has the burden of proving lack of adverse effect on other appropriators. In its discussion of the issue the Court noted that the burden of proof is controlled by the statute, which clearly places the burden on the applicant. The Court also noted that the statutory placement of the burden on the applicant conforms to general rules regarding burden of proof and referenced the rules codified at Mont. Code Ann. §§ 26-1-401 and 26-1-402. The law at issue in Royston (Mont. Code Ann. § 85-2-402) applies to authorizations to change existing water rights and does not apply here. Furthermore, the placement of the burden of proof in this matter is not inconsistent with Royston. In both cases, the same principles codified in Mont. Code Ann. §§ 26-1-401 and 26-1-402 apply.

Complainant argues that, by interpreting Mont. Code Ann. § 85-2-306(3) to require the senior appropriators to bear the burden of proof, the Hearing Examiner has made that statute

unconstitutional by allowing a taking of Complainant's property (water rights) without compensation and due process of law. I disagree. The Department's action in this matter does not void any provision of law or otherwise relieve the Permittee of the responsibility to comply with the law, including the provisions of Mont. Code Ann. § 85-2-401 that govern the priority of appropriation.

Conclusions of Law Nos. 3 and 12 unnecessarily go beyond the determination of burden of proof to include implied conclusions as to what facts must be proven without citing legal authority for these implied conclusions. Conclusions of Law Nos. 3 and 12 will be modified so they are limited to the burden of proof determination as applied to the law previously stated in Conclusions of Law No. 2 and 11.

Application

Complainant argues that the permit should be vacated or revoked because the applications were not correct and complete. In Conclusions of Law Nos. 1 and 10, the Hearing Examiner stated that he reviewed the application and agreed with the Regional Office's determination that the application was correct and complete.

A Hearing Examiner may review a determination of the Department, provided that the motion to do so is timely and the Department has the authority to grant the relief or order sought. In this case, the motion is not timely. The issue was not raised in Complainant's complaint, or identified in the notice of hearing, or the Order Supplementing First Prehearing Order (June 3, 2004) in this matter. (See discussion above under "Issues.") Furthermore, the Complainant has not shown that the Department has the authority to grant the order sought – revocation of the permits. A determination of whether or not the applications were correct and complete is not properly before the Department; therefore, Conclusions of Law Nos. 1 and 10 are hereby rejected.

Adverse Effect

Finding of Fact No. 6. The Hearing Examiner found that any overflow from a full Lower Pond reservoir is not diverted to any drainage other than Willow Creek. Complainant stated their belief that the evidence concerning overflow into another drainage concerned the Upper Pond and not the Lower Pond. Complainant does not argue that this finding is clearly erroneous and does not reference any evidence to the contrary. In response to a question I raised during the oral argument hearing, Complainant clarified that the concern was with the similar finding with respect to the Upper Pond (Finding of Fact No. 23). The Hearing Examiner based his finding on the testimony of Scott Irvin. Mr. Irvin testified that he investigated whether or not the Permittee was routing Willow Creek water into another drainage and that he found no evidence that he

was. Mr. Irvin did not differentiate between the two ponds in his answer to the question and the Complainant did not ask Mr. Irvin to clarify his response on cross-examination. Finding of Fact No. 6 is based on competent substantial evidence and will not be changed.

Finding of Fact No. 23. Complainant requests that this finding be modified to find that the overflow from the Upper Pond does not return to the streambed. There is ample evidence in the record to support the Hearing Examiner's finding that that overflow from the Upper Pond returns to Willow Creek. (Testimony of Scott Irvin, Leonard Moug, David Baldwin). Finding of Fact No. 23 is based on competent substantial evidence and will not be modified.

Findings of Fact Nos. 9 and No. 27. Permittee Pribyl excepted to these findings. Permittee argues that the finding that the reservoir is only full "when the Upper Ditch is flowing to capacity and water is flowing into the drop tube" should only apply when Complainant is irrigating with the Upper Ditch and provides suggestions for modifying the finding.

I have reviewed the complete record in this matter and I have determined that portions of this finding are not supported by competent substantial evidence. The testimony of Myrle Gollaher supports a finding that Complainant is not able to fully irrigate through the Upper Ditch unless the water level in the reservoir is close to the top of the drop tube. The record does not support the Hearing Examiner's finding that the reservoir is full when the Upper Ditch is flowing to capacity and water is flowing into the drop tube. Mr. Gollaher testified that he considered his reservoir to be full when water is flowing in the Upper Ditch; the Hearing Examiner went beyond the evidence in the record and found that his reservoir is full when water is not just flowing in the Upper Ditch, but the ditch is flowing to capacity and water is flowing into the drop tube.

However, the key issue with respect to this finding is the determination of adverse effect on Complainant's senior water right. Complainant's right to store water for irrigation and stock use can only be adversely affected as long as the reservoir continues to store water. There is no evidence in the record to show that the Gollaher reservoir continues to store water (as opposed to serving as a means of conveyance) up to the point when the Upper Ditch is flowing to capacity and water is flowing into the drop tube.

Mr. Gollaher testified twice, on cross-examination and redirect examination, that his period of use for irrigation is April 1 to September 30. Permittee did not dispute this period of use. (See Permittee's exception to Finding of Fact No. 9) Because the potential for adverse effect is different depending on whether or not Gollaher is irrigating, a review of the record leaves me with the definite and firm conviction that this information must be included in the findings of fact.

Findings of Fact Nos. 8 and 26 adequately address the issue of adverse effect on Complainant's storage rights.

Findings of Fact Nos. 9 and 27 will be modified based on my review of the complete record. (See State Personnel Division v. Child Support Investigators, 308 Mont. 365, 43 P.3d 305 (Board of Personnel Appeals modified portions of hearing officers findings and added findings supported by the record; Montana Supreme Court concluded that Board acted properly and did not abuse its discretion after determining from a review of the complete record and stating with particularity that the hearing officer's findings of fact, as a whole, were not based upon competent substantial evidence.)

Findings of Fact Nos. 10 and 28. Permittee argues that the Hearing Examiner erroneously found that Gollaher does not receive its senior appropriation for stock use when the Permittee diverts water at times that Willow Creek is flowing into the Gollaher reservoir when it is not yet full. Permittee points to evidence presented at the hearing that, according to Gollaher's water right claim no. 41QJ-20944100, Gollaher waters 300 cattle and argues that it is unreasonable and wasteful to require the entire reservoir to fill in order provide stock water to 300 cattle. The reservoir is used to store water for both irrigation and stock purposes. The Hearing Examiner weighed the evidence, which included the testimony of Myrle Gollaher, and found that all water flowing into the reservoir whenever the reservoir is not full is stored for later stock or irrigation use (Findings of Fact Nos. 8 and 26). Findings of Fact Nos. 10 and 28 are consistent with Findings of Fact Nos. 8 and 26. If the reservoir isn't full, then the right to one or both uses isn't fulfilled. (If the irrigation water right is fulfilled, the stock water right is shorted and vice versa.) Findings of Fact Nos. 10 and 28 are supported by competent substantial evidence; therefore, these findings will not be changed.

Findings of Fact Nos. 13 and 31. Complainant does not dispute the findings as written and agrees that not all water diverted upstream would make its way to the Gollaher reservoir, but argues that evidence shows Willow Creek flows both surface and subsurface to the Gollaher reservoir.

Whether or not Willow Creek flows below the surface as well as above the surface is not the issue here. The issue is whether or not water not diverted by Permittee will make it to the Gollaher reservoir above or below the ground. (See Conclusions of Law Nos. 6 and 16) Complainant did not cite evidence that shows that all water not diverted by Permittee will make it to the Gollaher reservoir.

Findings of Fact Nos. 13 and 31 are based on competent substantial evidence and will not be changed.

Findings of Fact Nos. 16 and 35. Complainant requests that I find that the Permittee's ponds are the direct cause of Gollaher's reservoir not filling. This finding is not necessary. The findings in the proposal, as modified by this order, are adequate to make the determination of adverse effect required by law.

Complainant argues that Permittee must show that they will be able to honor calls for water from prior appropriators. Findings of Fact Nos. 12 and 30 show that Permittee will be able to honor calls. Furthermore, the conditions require that Permittee be able to honor calls.

However, I conclude that these findings are really conclusions of law. Mr. Schmidt's opinion with respect to a conclusion of law is not relevant. The determination of adverse effect on Gollaher is adequately addressed in other findings and conclusions of law. Findings of Fact Nos. 16 and 35 are hereby rejected.

Conclusions of Law Nos. 6 and 16. Complainant argues that the flow in Willow Creek is not small as stated in the first sentence of these conclusions of law. The first two sentences of each conclusion of law referenced are really findings of fact and not conclusions of law. The Hearing Examiner did not reference findings or evidence to support these "findings." In particular, the Hearing Examiner did not reference any evidence to support the characterization of the flow in Willow Creek as small. Therefore, Conclusions of Law Nos. 6 and 16 will be modified to delete the first two sentences in each conclusion.

Conclusions of Law Nos. 7 and 17. These conclusions will be revised to reflect the Findings of Fact, as modified, and to be consistent with the conclusions regarding beneficial use of water in Conclusions of Law Nos. 5 and 15.

Conditions

Complainant argues that the proposed conditions are not adequate to protect the prior appropriation rights of the Gollahers and the permits should be revoked.

Complainant argues that certain conditions are not adequate because Complainant believes that permittee will not comply with the conditions. (See Complainant's exception to Findings of Fact Nos. 12, 30, 17, and 36.) A fear that the terms of a reissued permit will not be followed is not sufficient cause to revoke a permit. (See In the Matter of Application for Beneficial Water Use Permits No. 76LJ-11583000 by Benjamin L. and Laura M. Weidling and No. 76LJ-11583000 by Ramona S. and William M. Nessley, Cause No. BDV-2003-100, Order on Motion for Judicial Review (2004).) These conditions will not be changed.

Complainant objects to the Hearing Examiner's exclusion of "hearsay" evidence that Permittee filled the ponds in the summer and argued that the evidence should have been admitted to show that the modifications of the permit will not work. (Complainant's exception to

Finding of Fact No. 36) For the reasons stated above, I find this evidence to be irrelevant and conclude that there was no harm in excluding it.

Complainant argues that there is no condition that limits Permittee to diverting in the “off-season.” (Complainant’s exceptions to Findings of Fact No. 17 and 36). The conditions limit Permittee to diverting water when there will be no adverse effect to Kitson, Salo, and Gollaher, regardless of the season; this argument is not relevant.

Both parties argue that the permit conditions are confusing. Permittee requested clarification generally based on the argument that Permittee may divert water that cannot be put to beneficial use by the downstream prior appropriators. The conditions will be modified to be consistent with Conclusions of Law Nos. 7 and 17, as modified.

Both parties argued, and the Hearing Examiner found, that Kitson has a water right for irrigation use. (See Finding of Fact No. 11.) Kitson’s irrigation water right is not addressed in the conditions and it should be.

Condition C (Lower Pond). This condition requires the Permittee to wait 5 days after water appears at Permittee’s Lower Pond headgate to see if the (flow-producing) event has produced enough water to flow on the surface into the Gollaher reservoir. Complainant argues that the 5-day period is arbitrary and not factually based. The 5-day period is based on the record. (See Finding of Fact No.11.) Furthermore, the 5-day period is a waiting period. It does not authorize the Permittee to divert water when the water will flow on the surface into the Gollaher reservoir and be put to beneficial use.

Condition D (Upper Pond). This condition requires Permittee to wait 5 days after water appears at the Lower Pond headgate to see if the (flow-producing) event has produced enough water to flow on the surface into the Gollaher reservoir.

Permittee argues that this condition should be amended to make it clear that the Permittee can divert water into the Upper Pond at times when surface flows do not reach the Lower Pond. Permittee points to evidence that Willow Creek may flow on Pribyl’s property and never make it to the Kitson’s property or the Lower Pond. There is uncontradicted evidence in the record that Willow Creek may flow at the Upper Pond headgate and not reach the Lower Pond headgate. (Testimony of Jim Pribyl) Furthermore, Finding of Fact No. 31 and Conclusions of Law Nos. 14 and 15 recognize that the record does not show that all water diverted will make it to Gollaher’s reservoir and that Kitson (who puts water to use above the Lower Pond) and Gollaher are only adversely affected if the water will reach a point where they can put it to beneficial use. A finding that water may flow at the Upper Pond headgate but not flow as far as the Lower Pond headgate is implied and supported by the record.

During the oral argument hearing Permittee suggested that the condition be modified to require Permittee to wait 5 days to see if the water makes it to the Lower Pond. If water makes it to the Lower Pond, Permittee would wait an additional 5 days before diverting water. Complainant argues that the 5-day waiting period is arbitrary and not supported by the record. There is not sufficient evidence in the record to determine the length of time that it takes water to flow from the Upper Pond headgate to the Lower Pond headgate or Permittee's downstream property boundary, which is immediately downstream of the Lower Pond headgate. However, I conclude that a 5-day waiting period is reasonable. It would be unreasonable and contrary to law to prevent Permittee from diverting water when the water will not reach prior appropriators. (See Conclusion of Law No 15.) Complainant has not shown that it would take longer than 5 days for water to flow from the Upper Pond to the Lower Pond.

The conditions will be modified for the reasons stated above.

Inspection

The Hearing Examiner correctly concluded that he cannot provide for inspection conditions that would allow the Complainant to have unrestricted access to Permittee's land to verify that water is not being diverted until Complainant's reservoir has filled. The Hearing Examiner correctly concluded that the Department may enter upon land to make inspections pursuant to Mont. Code Ann. § 85-2-115; however, the Hearing Examiner does not have the authority to provide for access by the Complainant to the Permittee's land.

Complainant argues that the inspection should be imposed upon Pribyls in the nature of a secondary easement right. Complainant has not shown that the Department has the authority to *impose* a secondary easement right but appears to be asserting that Complainant has such a right. Whether or not Complainant has such a right is not within the jurisdiction of the Department to determine.

Proposed Order

In the proposed order for each permit, the Hearing Examiner modified certain elements of the permit without showing the Department had the authority to do so. These modifications fall into two categories:

- 1) Modifications that conform descriptive information in the permit to actual fact.
- 2) Changes to the amount appropriated under each permit.

The Hearing Examiner proposed a decrease in the amount appropriated under Permit No. 41QJ 30006070 and an increase in the amount appropriated under Permit No. 41QJ 30006071.

Pursuant to Mont. Code Ann. § 85-2-314, the Department may modify elements described in a permit when it finds that the actual conditions differ from those described in the permit. Therefore, the Department has the authority to modify the permit so the details described conform to reality. The Hearing Examiner found that the actual means of diversion, location of the reservoir, and capacity of the reservoir for each permit were different from what was documented in the permit. (Findings of Fact Nos. 5,7, 22, and 24) No party has disputed the accuracy of these corrections. No party will be prejudiced if the means of diversion, location of the reservoir, and capacity of the reservoir are corrected in a modified and reissued permit. The permits will be modified based on Findings of Fact Nos. 5,7, 22, and 24.

The Department has no authority to increase the amount of water appropriated under a permit in excess of the amount applied for. Mont. Code Ann. § 85-2-312. While the Department may decrease the amount of water appropriated if it finds that the water is not being applied to a beneficial use, such a determination is outside the scope of this contested case. (See above under “Issues.”) Even if that were not the case, Finding of Fact No. 7 does not show that the amount of water applied for is not being put to beneficial use. The Hearing Examiner determined that the total appropriation after four fills is 3.4 acre-feet (which is less than the amount applied for), but did not determine that the Permittee could only put this amount of water to beneficial use.

The amount of water appropriated under these permits will not be changed.

Based on the record in this matter, the Department makes the following:

ORDER

Permit No. 41QJ 30006070

The Department hereby adopts and incorporates by reference, with the modifications noted below, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Subject to the terms, conditions, restrictions, and limitations listed below, Permit No. 41QJ 30006070 is reissued with the following corrections: The capacity of the reservoir is 0.85 acre-feet. The place of storage is off stream. The means of diversion is a headgate and ditch.

A. Permittee shall not divert water from Willow Creek when water flows on the surface in Willow Creek to the Gollaher reservoir and water can be put to beneficial use by Gollaher for stock watering, irrigation, or storage for these purposes, consistent with Gollaher’s water rights.

B. When Salo or Salo's successor can put water from Willow Creek to beneficial use for stock, Permittee may only divert water from Willow Creek if the streamflow is greater than the flow necessary to satisfy Salo's beneficial use, consistent with Salo's water rights. This condition does not apply when Willow Creek has ceased flowing on the surface at Permittee's downstream property boundary, which is located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana.

C. Permittee shall close the Lower Pond headgate when Willow Creek is dry at this headgate. Permittee shall wait 5 days after water appears at the Lower Pond headgate to determine if water from the flow-producing event will flow on the surface in Willow Creek to the Gollaher reservoir.

E. Permittee's headgate must be maintained so any leakage from the headgate that cannot be prevented is immediately routed back to Willow Creek below the headgate.

F. Permittee shall contact prior appropriators as necessary to comply with the permit conditions.

On page 5, strike Finding of Fact No. 9 and insert the following:

"9. Irrigation use from the Gollaher reservoir occurs through the "Upper Ditch" from the reservoir when the water level in the reservoir is high enough. Complainant is not able to fully irrigate through the Upper Ditch unless the water level in the reservoir is close to the top of the drop tube. Gollaher's period of use for irrigation is April 1 through September 30. (Testimony of Myrle Gollaher)"

On page 6, strike Finding of Fact No. 16.

On page 7, strike Conclusion of Law No. 1.

On page 7, strike Conclusion of Law No. 3 and insert the following:

"3. Prior to the hearing and after consideration of briefs, the Hearing Examiner ruled that Complainant Gollaher has the burden of proof in this matter. Complainant Gollaher has the initial burden of producing evidence and the burden of persuasion in this matter. Once Complainant meets its initial burden of producing evidence, the burden of producing evidence shifts to Permittee. (Mont. Code Ann. §§ 26-1-401, 402; see July 23, 2004 Prehearing Order on Burden of Proof.)"

On page 9, strike Conclusion of Law No. 6 and insert the following:

“6. I have not seen sufficient evidence to prove that if all the water above the Gollaher reservoir were left in Willow Creek, even when it is not running on the surface, it would make it to the Gollaher reservoir either above or below ground. Without such a showing, it would be contrary to established case law to find adverse effect by the upstream use based upon its alleged adverse effect on subsurface water. (See Raymond v Wimsette, 12 Mont. 551, 31 P. 537 (1892); Findings of Fact Nos. 13 and 14.)”

On page 9, strike Conclusion of Law No. 7 and insert the following:

“7. Gollaher will be adversely affected if the Permittee diverts water from Willow Creek to the Lower Pond when Gollaher can put the diverted water to beneficial use. Gollaher will not be adversely affected if the water that is diverted would not reach the Gollaher reservoir.

Salo will be adversely affected if Permittee diverts water from Willow Creek to the Lower Pond when Salo can put the diverted water to beneficial use. Salo will not be adversely affected if Permittee only diverts water when water has ceased flowing on the surface at Permittee’s downstream property boundary.

To prevent adverse effect to prior appropriators, it is reasonable to require Permittee to close the Lower Pond headgate when Willow Creek is dry at this headgate. It is also reasonable to require Permittee to delay diversion of water at any time the prior appropriators can put the water to beneficial use. It is reasonable to require the Permittee to wait 5 days to determine whether or not the water will reach prior appropriators. In order to effectively fulfill these requirements, Permittee’s headgates must be maintained so any leakage is immediately routed back to Willow Creek below the headgate. (See Conclusion of Law No. 5 and Findings of Fact Nos. 8, 9, 10, 11, 12, 13, 14, 15, and 17.)”

Permit No. 41QJ 30006071

The Department hereby adopts and incorporates by reference, with the modifications noted below, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Subject to the terms, conditions, restrictions, and limitations listed below, Permit No. 41QJ 30006071 is reissued with the following corrections: The means of diversion is a headgate and ditch. The capacity of the reservoir is 11.44 acre-feet. The place of storage is located off stream.

On page 13, strike Finding of Fact No. 27 and insert the following:

“27. Irrigation use from the Gollaher reservoir occurs through the “Upper Ditch” from the reservoir when the water level in the reservoir is high enough. Complainant is not able to fully irrigate through the Upper Ditch unless the water level in the reservoir is close to the top of the drop tube. Gollaher’s period of use for irrigation is April 1 through September 30. (Testimony of Myrle Gollaher)”

On page 15, strike Finding of Fact No. 35.

On page 15, strike Conclusion of Law No. 10.

On page 16, strike Conclusion of Law No. 12 and insert the following:

“12. Prior to the hearing and after consideration of briefs, the Hearing Examiner ruled that Complainant Gollaher has the burden of proof in this matter. Complainant Gollaher has the initial burden of producing evidence and the burden of persuasion in this matter. Once Complainant meets its initial burden of producing evidence, the burden of producing evidence shifts to Permittee. (Mont. Code Ann. §§ 26-1-401, 402; see July 23, 2004 Prehearing Order on Burden of Proof.)”

On page 18, strike Conclusion of Law No. 16 and insert the following:

“16. I have not seen sufficient evidence to prove that if all the water above the Gollaher reservoir were left in Willow Creek, even when it is not running on the surface, it would make it to the Gollaher reservoir either above or below ground. Without such a showing, it would be contrary to established case law to find adverse effect by the upstream use based upon its alleged adverse effect on subsurface water. (See Raymond v Wimsette, 12 Mont. 551, 31 P. 537 (1892); Findings of Fact Nos. 31, 34.)”

On page 18, strike Conclusion of Law No. 17 and insert the following:

“17. Gollaher will be adversely affected if Permittee diverts water from Willow Creek to the Upper Pond when Gollaher can put the diverted water to beneficial use. Gollaher will not be adversely affected if the water that is diverted would not reach the Gollaher reservoir.

Salo will be adversely affected if Permittee diverts water from Willow Creek to the Upper Pond when Salo can put the diverted water to beneficial use. Salo will not be adversely affected if Permittee only diverts water when water has ceased flowing on the surface at Permittee's downstream property boundary.

Kitson will be adversely affected if Permittee diverts water from Willow Creek to the Upper Pond when Kitson can put the diverted water to beneficial use. Kitson will not be adversely affected if Permittee only diverts water when water has ceased flowing on the surface at Kitson's point of diversion or place of use for stock drinking directly from the source.

To prevent adverse effect to prior appropriators, it is reasonable to require Permittee to close the Upper Pond headgate when Willow Creek is dry at this headgate. It is also reasonable to require Permittee to delay diversion of water at any time the prior appropriators can put the water to beneficial use. It is reasonable to require the Permittee to wait 5 days to divert water in order to determine whether or not the water will reach Salo and Kitson. It is also reasonable to require Permittee to wait an additional 5 days to determine whether or not the water will reach the Gollaher reservoir. In order to effectively fulfill these requirements, Permittee's headgate must be maintained so any leakage is immediately routed back to Willow Creek below the headgate."

On page 19 and 20, strike Conditions A through E and insert the following:

A. Permittee shall not divert water from Willow Creek when water flows on the surface in Willow Creek to the Gollaher reservoir and Gollaher can put water to beneficial use for stock watering, irrigation, or storage for these purposes, consistent with Gollaher's water rights.

B. When Salo or Salo's successor can put water from Willow Creek to beneficial use for stock, Permittee may only divert water from Willow Creek if the streamflow is greater than the flow necessary to satisfy Salo's beneficial use, consistent with Salo's water rights. This condition does not apply when Willow Creek has ceased flowing on the surface at Permittee's downstream property boundary, which is located in the SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana.

C. When Kitson or Kitson's successor can put water from Willow Creek to beneficial use for stock or irrigation, Permittee may only divert water if the streamflow is greater than the flow necessary to satisfy Kitson's beneficial use, consistent with Kitson's water rights. This condition does not apply when Willow Creek has ceased flowing on the surface at Kitson's point of diversion or place of use for stock drinking directly from the source.

- D. Permittee shall close the Upper Pond headgate when Willow Creek is dry at this headgate. If Salo or Gollaher can put the water to beneficial use, Permittee shall wait 5 days after water appears at the Upper Pond headgate to see if the flow-producing event has produced enough water to flow in Willow Creek to Permittee's downstream property boundary. If the flow reaches Permittee's downstream property boundary and Gollaher can put water to beneficial use, Permittee must wait 5 more days to determine if the water in Willow Creek will flow on the surface into the Gollaher reservoir.
- E. Permittee's headgate must be maintained so any leakage from the headgate that cannot be prevented is immediately routed back to Willow Creek below the headgate.
- F. Permittee shall contact prior appropriators as necessary to comply with the permit conditions.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this _____ day of _____, 2005.

Original signed by Mary Vandebosch June 8, 2005
Mary Vandebosch
Hearings Officer
Water Resources Division
Department of Natural Resources and Conservation
PO Box 201601
Helena, MT 59620-1601